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plaintiff's administratrix could not continue to prosecute the appeal because the cause of action did not survive.²⁹ It is plain that the court regarded the cause of action here as the plaintiff's privilege to have the question of the defendant's liability to the deceased, had he lived, judicially determined.³⁰

It is regrettable that in the recent change from the Code of Civil Procedure to the Civil Practice Act, the legislators did not correct this unscientific terminology. Perhaps no particular misfortune will occur because of it, but in law, if nowhere else, consistency is a virtue.

THE EFFECT OF THE STATUTE OF FRAUDS ON ORAL AGREEMENTS RELATING TO REALTY.—The courts have decided that two sets of circumstances serve to take a case out of the Statute of Frauds.¹ One is part performance.² The Statute was adopted to avoid the uncertainties that accompanied parol agreements, especially when actions based on them do not arise until several years after the alleged contract.³ But when a party has performed, the evidence is not so uncertain. Hence equity will decree specific performance under these restrictions: (1) That the so-called part performance suggest some agreement between the parties with regard to the land.⁴ Then evidence is allowed showing just what that contract is. (2) That the plaintiff establish by clearly convincing evidence⁵ the existence of the agreement, instead of by the fair preponderance⁶ that is usual in civil actions. Fraud is the other circumstance. The avowed purpose of the Statute was to prevent the establishment of contracts by false swearing. Hence, it does not prevent equity from exercising its customary jurisdiction on the ground of fraud.⁷ The recent case of *Fletcher v. Manhattan Life Ins. Co.* (App. Div., 1st Dept. 1921) 189 N. Y. Supp. 453 exemplifies the comprehensive nature of the doctrine of fraud in equity. The plaintiff and defendant were participating owners of a mortgage, the plaintiff holding the junior lien. They brought a foreclosure action. Prior to the sale, it was orally agreed between

²⁹ *Lutz v. Third Avenue R. R.* (1899) 44 App. Div. 256, 60 N. Y. Supp. 761.

³⁰ In *Daniel v. Brooklyn Heights R. R.* (1912) 76 Misc. 482, 135 N. Y. Supp. 698, the cause of action was held to survive although it was not certain that the plaintiff could get judgment.

¹ St. 29 Car. II (1676) c. 3. A typical American statute is N. Y. R. P. Law (Cons. Laws 1909) § 242.

The Statute of Frauds also renders void parol agreements for express trusts. Act (1676) 29 Car. II c. 3, § vii. For New York see *supra*. The discussion in the note is just as applicable to trusts, as to simple direct conveyances. *Leman v. Whitley* (1828) 4 Russ. 423.

² *Ryan v. Dox* (1866) 34 N. Y. 307; *Logan v. Brown* (1908) 20 Okla. 334, 95 Pac. 441. (Agreement to sell land and hold proceeds in trust. Land was sold, and the defendant was declared a trustee as to the proceeds, though the agreement as to the land was not enforceable.)

³ See Smith, *Law of Frauds* (1907) § 311.

⁴ *Woolley v. Stewart* (1918) 222 N. Y. 347, 118 N. E. 847; see *Williams v. Morris* (1877) 95 U. S. 444, 457. Part performance may be carried through in two ways, either, as in the latter case, one party conveys, and thus does what he could not be compelled to do, leaving only the payment, which is not forbidden by the Statute; or the plaintiff performs so far that he has no means at law for restoring the *status quo*. Cf. *Glass v. Hulbert* (1869) 102 Mass. 24.

Specific performance is frequently given after part performance on the ground that the defendant, having been benefited at the expense of the plaintiff, to plead the Statute is fraudulent. See *Collins v. Lackey* (1912) 31 Okla. 776, 779, 780, 123 Pac. 1118; *Russell v. Sharp* (1905) 192 Mo. 270, 288, 91 S. W. 134.

⁵ *Carr v. Craig* (1908) 138 Iowa 526, 116 N. W. 720; *Boone v. Lee* (1918) 175 N. C. 383, 95 S. E. 659.

⁶ 4 Wigmore, *Evidence* (1905) § 2498.

⁷ *Arnold v. Cord* (1861) 16 Ind. 177.

them that the defendant should bid in the property at a price not greater than the amount due him, the plaintiff refrain from bidding, and at a subsequent date the defendant convey the property to the plaintiff, on being paid the purchase price and expenses. The plaintiff relying on the agreement did not bid at the sale, and later tendered the defendant the purchase price. He refused to accept the money or reconvey. Later the defendant sold the property to an innocent purchaser. The plaintiff sued to have the defendant declared a trustee of the property, and account for the difference between the proceeds of the sale and the amount tendered. The defendant pleaded the Statute of Frauds. On demurrer, *held*, for the plaintiff.

The facts in the principal case are commonly classified under the caption of "constructive fraud." Nothing can be clearer than that constructive fraud is not legal fraud.⁹ In truth the principal case starts out with the express proposition that the defendant did not make the agreement as part of a scheme to defraud or mislead the plaintiff. The constructive fraud rises out of the circumstances of the case other than the intent of the defendant.⁹ Despite the undoubted good faith of the defendant's promise when first made, yet when the time came to perform, he refused to do so. Because the plaintiff relied on the promise he had lost money. Hence the defendant should be held to his promise.¹⁰

A few jurisdictions dissent from this doctrine and ground their objections on the Statute of Frauds.¹¹ They reason in this way. Suppose that there were no Statute of Frauds. The promise made by the defendant would then be binding, and equity would compel him to reconvey the property to the plaintiff. But the Statute of Frauds now declares the promise nugatory, and of no effect, either at law or in equity. It is as though no promise had been made. How can the plaintiff complain that he has been defrauded because the promise did not have the legal consequences which the Statute expressly frustrated its having? The defendant simply states the words of the Statute and insists on observing them. Can that be fraudulent? It is true that formerly the plaintiff was a mortgagee, and now he has no interest in the property. But this was not caused by the defendant's promise. It is a result of the Statute which invalidates the promise. Though the defendant's conduct is morally reprehensible, yet it is at no time inequitable to insist on one's legal rights.

These jurisdictions misinterpret the Statute of Frauds. It expressly excepts out of its operation trusts arising by "implication or construction of law."¹² Without stopping to consider resulting trusts, it is well settled that fraud in the acquisition of property will ground a constructive trust in regard to it.¹³ Nor does equity give to fraud the narrow meaning of deceit which it has at law. Courts frequently talk of the result of certain facts being a fraud on the plaintiff, not at all implying that the defendant was fraudulent. The inference is that under the circumstances it is unconscionable for the defendant to retain the property. That makes the defendant's conduct fraudulent.¹⁴ For instance, where

⁹ *Thomas v. Goodbread* (1919) 78 Fla. 278, 82 So. 835; *Brock v. Brock* (1888) 90 Ala. 86, 91, 8 So. 11.

¹⁰ *Strasner v. Carroll* (1916) 125 Ark. 34, 187 S. W. 1057; *Collins v. Williamson* (1894) 94 Ga. 635, 21 S. E. 140.

¹¹ *Cutler v. Babcock* (1892) 81 Wis. 195, 51 N. W. 420; *Broadwell v. Smith* (Ga. 1921) 108 S. E. 809.

¹² *Kellum v. Smith* (1859) 33 Pa. St. 158, 164, 165. The fraud must be in the transaction from its inception. *Seif v. Muse* (1918) 70 Pa. Super. Ct. 487. If the fraud lies in the defendant's breach of promise, it is subsequent to the conveyance, and hence the promise falls within the Statute. *Jourdan v. Andrews* (1917) 258 Pa. St. 347, 102 Atl. 33.

¹³ Statute of Frauds § 8.

¹⁴ *Arnold v. Cord*, *supra*, footnote 7.

¹⁵ *Bardon v. Hartley* (1910) 112 Wis. 74, 87 N. W. 809; *Young v. Overbaugh*

the defendant made a gift of land to the plaintiff and promised to give a deed, and the plaintiff relying on the promise entered on the realty, making improvements with the knowledge of the donor; upon the defendant's subsequent refusal to pay, the court ordered the defendant to perform.¹⁵ Otherwise as the plaintiff had no redress at law, the defendant's conduct would be unconscionable. The argument that the Statute declares all agreements in regard to realty as of no effect is beside the point, as equity does not concern itself with the promise or contract but exercises its original jurisdiction on the ground of fraud.

Cases of unconscionable conduct—constructive fraud—occur frequently in judicial sales, as in the instant case. Courts, however, will not enforce performance unless there be a loss. If the plaintiff is a mortgagor who enters with his mortgagee into an agreement similar to that in the principal case, equity will not force a reconveyance if the property sells at the market price.¹⁶ The cases where the doctrine has been applied have usually been those where the purchase price was ridiculously below the value of the property.¹⁷ In *Ryan v. Dorr*,¹⁸ the leading New York case, property worth \$4,000 sold for \$100. Other cases were, property worth \$70,000 sold for \$2,000,¹⁹ and \$5,000 for \$176.²⁰ It may be safely said that equity will not enforce a reconveyance unless the values and prices are clearly disproportionate, though the judicial mind uses a flexible standard.²¹

The weakness of the doctrine lies in its strict, where the facts of modern economic life would justify a fair, application. The courts have refused to raise a constructive trust in the property unless at the time of the sale, the plaintiff held an existing legal or equitable interest in it.²² Otherwise, they reason, the plaintiff suffers no loss. This is a strange argument for a modern court. A person who at the time of a foreclosure sale has no interest in the property but intends to buy and is persuaded not to bid by relying on the promise of another to buy and reconvey, suffers as real a loss, and in many cases a greater one, than does a mortgagor under similar circumstances. The loss of the chance to make a profit is as important as the loss of money from the pocket. Our entire economic system is based on profit. Seats on the Stock Exchange sell for thousands of dollars—and they are nothing more than opportunities for making profit. But courts refuse to recognize this.²³ Some go as far as to exclude certain legal interests, because they are not *in esse*, but mere possibilities, like courtesy initiate.²⁴ Of course they would exclude evidence showing that a plaintiff who without an existing interest had contracted obligations, the performance of which depended on the acquisition of the property.²⁵

The courts uniformly repudiate the suggestion that they are specifically enforce-

(1895) 145 N. Y. 158, 39 N. E. 712; *Hardman v. Ryan* (1919) 106 Wash. 433, 180 Pac. 142; *Watson v. Harris* (Tex. Civ. App. 1910) 130 S. W. 237.

¹⁵ *Messiah Home, etc. v. Rogers* (1914) 212 N. Y. 315, 106 N. E. 59.

¹⁶ *Wheeler v. Reynolds* (1876) 66 N. Y. 227. In no other way can this be distinguished from the instant case.

¹⁷ *Thomas v. Goodbread*, *supra*, footnote 8.

¹⁸ *Supra*, footnote 2.

¹⁹ *Woodruff v. Jabine* (Ark. 1891) 15 S. W. 830.

²⁰ *Trapnall v. Brown* (1857) 19 Ark. 39.

²¹ *Dickson v. Stewart* (1904) 71 Neb. 424, 98 N. W. 1085.

²² *Parramore v. Hampton* (1908) 55 Fla. 672, 45 So. 992; *Emerson v. Galloupe* (1892) 158 Mass. 146, 32 N. E. 1118; *Fischli v. Dumaresly* (Ky. 1820) 3 A. K. Marsh. 23.

²³ *Levy v. Brush* (1871) 45 N. Y. 589; *Largey v. Leggat* (1904) 30 Mont. 148, 75 Pac. 950; see *McNew v. Booth* (1868) 42 Mo. 189, 192. Usually a plaintiff sues when the property has considerably risen in value, so that his loss is keenly felt.

²⁴ *Lancaster Trust Co. v. Long* (1908) 220 Pa. St. 499, 69 Atl. 993; *Fields v. Hoskins* (1918) 182 Ky. 446, 206 S. W. 753 (lien).

²⁵ *Cf. Scheuer v. Cochem* (1905) 126 Wis. 209, 105 N. W. 573, and cases cited *supra*, footnote 23.

ing a void agreement.²⁶ They strenuously assert that the Statute is just as operative in equity, as at law.²⁷ Nevertheless the result of their proceedings is just the same as though their intention was to disregard it. They, however, place their decision on the constructive fraud which would result if the plaintiff were to suffer a loss.²⁸ But if the intention of equity were merely to prevent the loss, it would be content to restore the plaintiff to his *status quo*, or where that was literally impossible, give him its equivalent. But it goes much further than that, and grants him what he originally bargained for. While the reasoning on which the decisions go is weak, their result is sound. Once equity is granted jurisdiction on the ground of fraud, it is competent to decide the kind of relief that is most appropriate.

A few jurisdictions approach constructive fraud from the estoppel angle.²⁹ Others reach the same result by construing the facts as a breach of relations prior to or contemporaneous with the agreement which justified the reposing of confidence in the promisor,³⁰ such as kinship,³¹ principal and agent,³² fiduciary connection³³ and the like.³⁴ Sometimes extreme circumstances, like the confidence necessarily placed by a dying person in one at his bedside, answer the rule.³⁵

The effect of this judicial interpretation has been considerably to limit the Statute of Frauds as applied to agreements creating or transferring interests in realty. The Statute will never be enforced except when (1) the orally contracting parties have had no previous relations justifying the placing of faith by one in the other, or (2) when the agreement being prior to a sale neither party has an existing legal or equitable interest in the property, which he loses on the strength of the promise.

²⁶ *Robinson v. Cruzen* (Mo. App. 1918) 202 S. W. 449, 452; *Boone v. Lee*, *supra*, footnote 5.

²⁷ *Wheeler v. Reynolds*, *supra*, footnote 16.

²⁸ See *Avery v. Stewart* (1904) 136 N. C. 426, 435, 48 S. E. 775. The court affirms that it finds fraud only for the purpose of working out a remedy.

²⁹ *Parker v. Catron* (1905) 120 Ky. 145, 85 S. W. 740; *Griffin v. Schlenk* (Ky. 1907) 102 S. W. 837.

³⁰ *Brison v. Brison* (1888) 75 Cal. 525, 17 Pac. 689; *Crossman v. Keister* (1906) 223 Ill. 69.

³¹ *Ward v. Conklin* (1908) 232 Ill. 553, 83 N. E. 1058.

³² *Densmore v. Searle* (1896) 7 App. Div. 45, 39 N. Y. Supp. 948.

³³ *Yuster v. Keefe* (1910) 46 Ind. App. 460, 90 N. E. 920.

³⁴ *Congregation, etc. v. Universal B. & C. Co.* (1909) 134 App. Div. 368, 119 N. Y. Supp. 72.

³⁵ *Larmon v. Knight* (1892) 140 Ill. 232, 29 N. E. 1116.